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Supreme Court, U.S.
FILED
JUL 26 2001
OFFICE OF THE CLERK

No. 00-1940

In The

Supreme Court of the United States

RICHARD E. FINLAN,

Petitioner,

v.

DALLAS INDEPENDENT SCHOOL DISTRICT, SANDY KRESS, CHAD WOOLERY, HOLLIS BRASHEAR, WILLIAM KEEVER, LYNDA McDOW, KATHLEEN LEOS, YVONNE EWELL, LARRY FRIEDMAN, ALAN RICH, FRIEDMAN & ASSOCIATES, P.C., DENNIS EICHELBAUM, and SCHWARTZ & EICHELBAUM, P.C.,

Respondents.

On Petition For A Writ Of Certiorari To The Texas Supreme Court

DISD RESPONDENTS' RESPONSE TO FINLAN'S WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Are the DISD Respondents – its Trustees and Superintendent incumbent in September 1995 – entitled to Qualified Immunity and why did Finlan's Petition for Writ of Certiorari not cite and discuss *Harlow v. Fitzgerald*?

2. Does this Court's holding in *Albright v. Oliver* – also not cited nor discussed in Finlan's Petition – preclude Finlan from claiming that he had "substantive Fourteenth Amendment rights" that were violated by acts of the Respondents?

3. Doesn't *Paul v. Davis* and the Fifth Circuit's *Colson v. Grohman* provide an alternative ground to support the decision below?

4. Doesn't Rule 13 of the Texas Rules of Civil Procedure comply with the requirements of the *Parratt/Hudson* Doctrine so that Finlan cannot assert claims under § 1983?

5. Can Finlan claim that the filing of the DISD's September 13, 1995 lawsuit against him was in retaliation for the exercise of his First Amendment rights when the Texas Court has concluded that machinations between Finlan, Ed Grant and others in the "162nd civil rights suit" are the "basis" for the DISD lawsuit?

6. Should Finlan be allowed to relitigate in this cause claims he has already unsuccessfully asserted in other lawsuits?

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I. SCHOOL DISTRICT NOT A RESPONDENT

Finlan's Petition for Certiorari incorrectly includes the Dallas Independent School District (the "DISD") as a party which prevailed against Finlan in the court below. The DISD's Summary Judgment Motion was based solely on the Eleventh Amendment. The trial court's grant of summary judgment to the DISD was reversed and remanded. *Dallas Ind. Sch. Dist. v. Finlan*, 27 S.W.3d 220, 240-44 (Tex. App. – Dallas 2000) (pp. 37-38 of Finlan's Appendix)

II. THE PETITION SHOULD BE DISMISSED FOR LACK OF JURISDICTION

A. Judgment Based On Independent And Adequate State Grounds.

The judgment of the court below is based on independent and adequate state grounds; therefore this Court lacks jurisdiction. *E.g., Black v. Cutter Laboratories*, 351 U.S. 292, 297-98 (1956); *Herb v. Pitcairn*, 325 U.S. 117, 125 (1945). When the DISD sued Finlan, et al. in September 1995, Finlan quickly filed his § 1983 counterclaim charging that the suit was filed in retaliation for his exercise of First Amendment rights.

The court below not only held Finlan's rights had not been violated by the filing of the lawsuit (27 S.W.3d at 240-44), it also found the DISD had probable cause to make the filing and reversed the trial court's summary judgment in Finlan's favor:

> We conclude DISD's evidence raises fact questions concerning the alleged agreement among

> Finlan, Venable, and Grant to defraud DISD by obtaining consent judgments against DISD regardless of the merits of Finlan's and Venable's civil rights suit in the 162nd District Court and to collect the judgments from the TASB.

Id. at 232.

Every lawsuit, except those in the nature of a declaratory judgment action, can be said to be filed in retaliation for something or other. Here is a state court's conclusory finding that the retaliatory motive of the DISD in initiating the September 1995 lawsuit was not because Finlan was a First Amendment pest but because he was trying to pick the DISD's pocket.

And, how was that determination made? By the due process of law.

B. Certiorari Is Sought To Wrong Court.

It is the opinion of the Fifth District Court of Appeals at Dallas that Finlan challenges here. After that opinion was rendered, Finlan filed a Petition for Review with the Texas Supreme Court, which was denied. Rule 56.1(a) of the Texas Rules of Appellate Procedure, "Consideration in Granting Review" when a petition for review is filed, reads as follows: "Whether to grant review is a matter of judicial discretion." The final judgment subject to review here is that of the Court of Appeals; Finlan has sought review of the discretionary decision of the Texas Supreme Court denying his Petition for Review. His Petition here should be denied for want of jurisdiction. *Michigan-Wisconsin Pipe Line Co. v. Calvert*, 347 U.S. 157 (1954).

III. FEDERAL STATUTE INVOLVED: SECTION 1983

Finlan's action below was predicated upon an asserted violation of 42 U.S.C. § 1983, not on a direct violation of the First Amendment. Section 1983 provides, in pertinent part, as follows:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights . . . secured by the Constitution and laws, shall be liable to the party injured in an action at law. . . .

IV. STATEMENT OF THE CASE

The DISD Respondents object to the "Statement of the Case" in the Petition. In the early '90s, Finlan did make a number of allegations of improprieties concerning the DISD's handling of its bond funds. And, along with his then cohort, Don Venable, did file a lawsuit based on those allegations. This led to the appointment of the Texas Commissioner of Education as Master and his hiring of Deloitte & Touche. The accounting firm's report did reveal shortcomings in the DISD's accounting records, but nothing like the massive frauds asserted by Finlan.

We adopt the "Background" section of the Opinion of the court below found at 27 S.W.3d at 230 (pp. 12-13 of Finlan's Appendix), from which we glean the following:

a. The DISD sued Finlan and Venable in October 1992 "for tortious interference with the relationship and contract between the board

and Goldman, Sachs & Company." Thus, such filing was not a retaliatory lawsuit predicated on Finlan's protected First Amendment actions, as the Petition claims.

b. In "response to" the "tortious interference suit" Finlan and Venable filed (i) a civil rights counterclaim in that lawsuit, and (ii) in 1994, filed the "162nd civil rights suit."

c. Ed Grant who had been a DISD Trustee and was named as a counterdefendant in the "tortious interference suit" and as a defendant in the "162nd civil rights suit" confessed judgment on the § 1983 claims of Finlan, retained Venable's lawyer, Ron Hinds, to represent him in a crossclaim against the DISD lawyers who had advised that the "tortious interference suit" be filed and, together with Finlan, "presented an agreed judgment in favor of Finlan for $300,000 to the judge who signed it."

d. The "events" in the "162nd civil rights suit" were the "basis for the DISD's civil conspiracy claims" before the Court of Appeals.

What was not in the record before the court below was what happened to these counterclaims in the "tortious interference lawsuit" and to Finlan's and Venable's claims in the "162nd civil rights suit." After the DISD's petition was dismissed, the parties to the 1992 litigation were realigned with the counterclaimants becoming plaintiffs. The "162nd civil rights suit" was consolidated with the 1992 suit which was then pending in the 101st Judicial District Court (see DISD Respondents' Appendix 1). Summary Judgment was granted to the DISD and the

DISD Respondents on Finlan's and Venable's § 1983 claims by Order dated July 26, 1999. (Appendix 2) On June 19, 2000, Final Judgment was entered confirming the earlier grant of summary judgment and granting summary judgment to the lawyer defendants. (Appendix 6) Finlan has perfected an appeal which pends before the Eleventh Court of Appeals, Eastland, Texas.

On page 6 of the Petition, Finlan tells of his request to School Superintendent Woolery to provide copies of campaign finance information of the School Board Members. This resulted in the DISD's filing on September 6, 1995 of a declaratory judgment suit against him and Venable, who had made a similar demand. This filing, of course, drew a § 1983 counterclaim by Finlan which was expanded to, and incorporated within, the counterclaim claiming a violation of § 1983 by the September 13, 1995 filing of the RICO, etc. lawsuit, which was the basis of Finlan's claim in the court below.

Venable filed a separate lawsuit in federal court claiming that the September 6th filing violated § 1983. After summary judgment was granted to the defendants (Appendix 11), Venable did not pursue his claims relating to the September 6th filing. He did appeal another asserted § 1983 violation relating to a bond forfeiture proceeding. The Fifth Circuit, in a per curiam opinion, found that this appeal "is without arguable merit and is frivolous" and ordered it dismissed. (Appendix 17)

Another related lawsuit began with the filing in 1994 by Finlan and Venable of a declaratory judgment action against William Keever, then a DISD Trustee, seeking his campaign finance records. Keever filed a declaratory

judgment counterclaim that those records were not covered by the Open Records Act. This counterclaim provoked § 1983 counterclaims against Keever and his lawyers by Finlan and Venable, which were removed to federal court. After summary judgment was granted to the defendants, Finlan perfected an appeal to the Fifth Circuit which found that his appeal "is without arguable merit and is frivolous" and ordered it dismissed. (Appendix 19)

So, Finlan's claims here did not grow out of a history of oppression, retaliation, and civil rights violations by the DISD and the DISD Respondents as is asserted in the Petition. Rather, Finlan's claims here are just one in a series of "frivolous," "meritless" § 1983 claims by Finlan.

V. FINLAN HAS NOT ALLEGED A DEPRIVATION OF A CONSTITUTIONAL RIGHT

Baker v. McCollan teaches that

> The first inquiry in any § 1983 suit, therefore, is whether the plaintiff has been deprived of a right "secured by the Constitution and laws." If there has been no such deprivation, the state of mind of the defendant is wholly immaterial.

443 U.S. 137, 140 (1979) With Finlan retaliation is automatically a deprivation and state of mind is of central importance, not wholly immaterial.

The court below held that there was no violation of § 1983 committed by the filing of the civil lawsuit. 27 S.W.3d 220, 244 (Tex. App. – Dallas 2000) ("We have held

the filing of the civil case was not a constitutional violation.") There is no real or intolerable conflict between the decision below on that issue and any of the decisions of this Court discussed, quoted or cited in the Petition.

There is one decision of this Court – *Albright v. Oliver*, 510 U.S. 266 (1994) – that is on point, but not in conflict; the decision below is completely compatible with *Albright* and is, moreover, through its reliance on *Johnson v. Louisiana Dep't of Agriculture*, 18 F.3d 318 (5th Cir. 1994) derived from *Albright*.

Albright is not a case cited in Finlan's Petition.

Petitioner's claim in *Albright*, according to the plurality opinion, was that "the action of respondents infringed his substantive due process right to be free of prosecution without probable cause." (510 U.S. at 271) Here, Finlan's main claim is that the action of Respondents violated his "substantive Fourteenth Amendment rights" (Petition p. 19) by the filing of the civil claims – regardless of whether or not there was probable cause. Obviously the four members of the *Albright* plurality are not going to extend "the protections of substantive due process" to Finlan's complaints about a civil proceeding. (*Id.* at 271-72)

Justice Scalia, concurring, "reject(s) the proposition that the Due Process clause guarantees certain unspecified liberties, rather than merely guarantees certain procedures as a prerequisite to deprivation of liberty." (*Id.* at 275) By so doing, he rejects Finlan's claim here. Justice Ginsburg agreed that Albright's claim is "properly analyzed under the Fourth Amendment rather than under the heading of substantive due process." (*Id.*

at 276) Further, there was not a seizure of Finlan here as there was of Albright, which made the difference between her analysis and that of the plurality. Justice Kennedy's concurrence – joined by Justice Thomas – agrees that Albright's claim "must be analyzed under the Fourth Amendment without reference to more general considerations of due process." (*Id.* at 281) Justice Souter also agreed that "petitioner has not justified recognition of a substantive due process violation in his prosecution without probable cause." (*Id.* at 286) Lastly, Justice Stevens' dissent – in which Justice Blackburn joined – provides no solace to Finlan in that its analysis is derivative of the principle that "The Fifth Amendment to the Constitution constrains the power of the Federal Government to accuse a citizen of an infamous crime." (*Id.* at 291)

In summary, Finlan can find no support in any of the *Albright* opinions for his claim of a violation of substantive due process. Worse for him, the plurality and concurring opinions are fatal to his position.

At the Circuit level, there are a number of cases that hold that there is no violation of § 1983 presented by the filing of a civil lawsuit or counterclaim. Among other Fifth Circuit opinions finding no violation of § 1983 in the filing of civil litigation by a governmental entity are *Whittington v. Johnston*, 201 F.2d 810 (5th Cir. 1953); *Curry v. Ragan*, 257 F.2d 449 (5th Cir.), *cert. den.*, 35 U.S. 851 and *reh. den.* 358 U.S. 914 (1958); *Beker Phosphate Corp. v. Muirhead*, 581 F.2d 1187 (5th Cir. 1978); *Whatley v. Philo*, 817 F.2d 19 (5th Cir. 1987); and, of course, *Johnson v. Louisiana Dep't of Agriculture*, 18 F.3d 318 (5th Cir. 1994).

Among other circuits that have reached a similar conclusion that the filing of a civil lawsuit does not implicate § 1983 are *Moffett v. Commerce Trust Co.*, 187 F.2d 242 (8th Cir. 1951); *Bell v. School Bd. of City of Norfolk*, 734 F.2d 155 (4th Cir. 1984); *Paskaly v. Seale*, 506 F.2d 1209 (9th Cir. 1974); *Bottone v. Lindsley*, 170 F.2d 705 (10th Cir. 1948). *See also Bradford v. Lefkowitz*, 240 F. Supp. 969, 977 (S.D.N.Y. 1965) ("Neither the Fourteenth Amendment nor the Civil Rights Act purports to secure a person against unfounded or even malicious claims or suits in state courts, especially when the laws and courts of the state are available and furnish adequate remedies to a person aggrieved."). *See generally* ANNOTATION, ACTIONABILITY OF MALICIOUS PROSECUTION UNDER 42 USCS § 1983, 79 A.L.R. Fed. 896 (1986).

Of the score or more Circuit cases cited by the Petition, only three – not counting *Johnson v. LDOA* – were concerned with malicious prosecution issues. In *Harrison v. Springdale Water & Sewer Comm.*, 780 F.2d 1422 (8th Cir. 1986) the counterclaim by the government actors sought to condemn Harrison's property; a recorded *lis pendens* accompanied the filing of the lawsuit. As the Eighth Circuit observed:

> The real gist of the Harrisons' complaint is found in the statement that "if public officials are allowed to use that power [of eminent domain] to punish those who seek protection in the courts, then the courts and justice will be denied to many citizens."

(*Id.* at 1428) In contrast to the situation here, the condemnation suit in *Harrison* worked a deprivation of property which was undertaken for the admitted purpose of coercing a sale of the property at the city's price. This decision

predates *Albright*. The issue before the Second Circuit in the second case, *Greenwich Citizens Comm. v. Counties of Warren*, 77 F.3d 26 (2nd Cir. 1996), was whether the trial court erred in not requiring a finding that either (a) the counterclaims were filed in "retaliation" for exercise of First Amendment rights or (b) were filed as "a legitimate response to litigation." (p. 31) That opinion was predicated on the assumption that a § 1983 violation could be based on the filing of a civil lawsuit by government actors; it never tested or addressed the correctness of such assumption. Although decided subsequently to *Albright*, it nowhere cites or considers *Albright*. The third case, *Rolf v. City of San Antonio*, 77 F.3d 823 (5th Cir. 1996) was similar to *Harrison* in that condemnation of plaintiff's land was sought – a deprivation of a property interest. Neither was *Albright* cited in *Rolf*. Under the Fifth Circuit's intra-circuit stare decisis rule, the *Rolf* panel was bound by *Johnson v. LDOA;* obviously the condemnation element of *Rolf* distinguished it from both *Albright* and *Johnson v. LDOA*.

The case most clearly on point is the case most relied upon by the court below, *Johnson v. LDOA*[1]. The Fifth Circuit opinion followed soon after this Court had handed down *Albright*. There, Johnson claimed that retaliatory administrative actions were lodged against him for

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[1] The Sixth Circuit's decision in *Cullinan v. Abramson*, 128 F.3d 301 (6th Cir. 1997), *cert. den.*, 523 U.S. 1094 (1998) is in complete accord with *Johnson v. LDOA*. There, the court reversed the denial of summary judgment on qualified immunity grounds after finding that no reasonable official would have believed he was violating clearly established rights by the filing of a retaliatory lawsuit.

not making "a large enough contribution" to the Commissioner's reelection campaign and that there were "coercive attempts to stifle him in his free expression of speech." (18 F.3d 320) The Court agreed with the district court that, if there were a § 1983 claim asserted, it was "one for malicious prosecution in violation of Johnson's First Amendment rights." *Id.* It immediately adds, "Whether the Constitution comprehends any such claim is far from clear." The court made clear (*Id.* at 321, fn. 2) that prior to *Albright*, the Fifth Circuit had generally held malicious prosecution in criminal proceedings were "serious enough" to be actionable under § 1983 but not those in civil proceedings. Finlan attempts to distinguish *Johnson v. LDOA* by arguing that the claims of civil malicious prosecution are more serious than are criminal malicious prosecutions.

Finlan to the contrary, for an administrative proceeding which resulted in sanctions and, *a fortiori*, for a purely civil action, the Fifth Circuit requires that, "at the very least" a § 1983 claimant must "establish all elements of the common law tort action." (*Id.* at 320) The court below's reversal of summary judgment for Finlan on the civil conspiracy claim (28 S.W.3d at 229-32) established probable cause and negated one essential element of Finlan's malicious prosecution cause of action. More importantly for the "deprivation" requirement of § 1983, Finlan fails to allege facts to establish a second element of a common law malicious prosecution claim, that of special damage or special injury through some physical interference with the party's person or property in the form of an arrest, attachment, injunction or sequestration. *See Texas Beef & Cattle Co. v. Green*, 921 S.W.2d 203, 209 (Tex. 1996)

Johnson v. LDOA was the first in what is an ever-expanding universe of circuit cases attempting to apply *Albright* to § 1983 claims bottomed on an alleged malicious prosecution. There is conflict and confusion among the Circuits, but not such that in any way conflicts with the decision below. Some, like *Johnson v. LDOA* and the court below, require that all of the elements of a common law malicious prosecution claim must be established.[2] Others require establishing such elements – and more.[3] But all hold that, unless a lack of probable cause can be established[4] and unless there was a "seizure,"[5] there can be no § 1983 cause of action. Finlan's § 1983 claims do not contain either the seizure element or the lack of probable cause element.

There is no conflict between the opinion below and any decision of this Court or of any circuit court of appeals on Finlan's central claim of a violation of substantive due process because, as the court below, summarizing *Johnson v. LDOA* found

> . . . there is no clearly established right to claim a First Amendment violation from the filing of a civil lawsuit, even one alleged to be malicious

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[2] *E.g., Cervanates v. Jones*, 188 F.3d 805, 808-09 (7th Cir. 1999), *cert. den.*, ___ U.S. ___, 145 L.Ed.2d 1071 (2000).

[3] *E.g., Lambert v. Williams*, 223 F.3d 257, 261 (4th Cir. 2000), *cert. den.*, ___ U.S. ___ 148 L.Ed.2d 797 (2001).

[4] *E.g., Taylor v. Meacham*, 82 F.3d 1556, 1561-62 (10th Cir. 1996).

[5] *E.g., Britton v. Maloney*, 196 F.3d 24, 29 (1st Cir. 1999), *cert. den.*, ___ U.S. ___, 147 L.Ed.2d 234 (2000).

> prosecution in retaliation for the exercise of free speech rights.

27 S.W.3d at 244.

The court below was also correct in its consideration and application of relevant Fifth Circuit authorities to Finlan's claim that his right to access the courts had been illegally infringed upon. The court correctly cited and quoted *Foster v. City of Lake Jackson*, 28 F.3d 425, 430 (5th Cir. 1994) for the proposition that such right of access is implicated "where the ability to file suit was delayed, or blocked altogether." 27 S.W.3d at 244 And, likewise with respect to *Hale v. Townley*, 45 F.3d 914, 920 (5th Cir. 1995) to the effect that government's filing of civil suit is not an "official impediment" to the "facilitative right to institute a suit." *Id.*

Further support for the court below can also be found in *Crowder v. Sinyard*, 884 F.2d 804 (5th Cir. 1989), *cert. den.*, 496 U.S. 924 (1990). There, the court was asked to adopt the Eighth Circuit's holding in *Harrison v. Springdale Water & Sewer Comm.*, cited *supra*, that the filing of the retaliatory counterclaim stated a cause of action for infringement of the constitutional right of access to the courts. The Fifth Circuit expressly declined to approve or disapprove such holding. 884 F.2d at 812-13 fn.9 Therefore, it has not been established in Fifth Circuit jurisprudence that there exists a constitutional right of access to the courts as Finlan would frame such right.

The court below is eminently correct in its holding that "the filing of the civil case was not a constitutional violation. . . . " 27 S.W.3d at 244

VI. RESPONDENTS ARE ENTITLED TO QUALIFIED IMMUNITY

The court below correctly applied controlling federal precedents to analyze Respondents' Qualified Immunity defense. It correctly took the first step in the "sequential two-step inquiry" mandated by this Court in *Siegert v. Gilley*, 500 U.S. 226, 231 (1991) and by the Fifth Circuit in *Coleman v. Houston Indep. Sch. Dist.*, 113 F.3d 528, 533 (5th Cir. 1997) and elsewhere. It correctly looked to *Anderson v. Creighton*, 483 U.S. 635, 640 (1987) and to *Foster v. City of Lake Jackson*, cited *supra*, to determine what "clearly established" means. That step ended with the correct conclusion that the conduct complained of here did not violate any clearly established constitutional right. If there were any uncertainty about the "clearly established" requirement, we need look no further than Judge Jones's concurring opinion in *Kerr v. Lyford*, 171 F.3d 330, 342-43 (5th Cir. 1999).

Having firmly and flatly taken the first step, the Court need not take the second step to end its inquiry. The DISD Respondents were correctly determined to be entitled to the Qualified Immunity defense. *Harlow v. Fitzgerald*, 457 U.S. 800 (1982)

VII. *PAUL V. DAVIS* AND *COLSON V. GROHMAN* PROVIDE ALTERNATIVE GROUNDS OF SUPPORT FOR THE OPINION BELOW

This Court in *Paul v. Davis*, 424 U.S. 693 (1976) rejected a § 1983 claim based on the distribution of flyers by the police which had plaintiff's picture on them and identified him as a shoplifter when he had been arrested,

but not prosecuted, for such crimes. In essence, *Paul v. Davis* held that, without more, injury to reputation does not implicate a protected liberty or property interest. Such "reputational damages" are all the injury that Finlan asserts here. Other courts have recognized that the mere filing of a lawsuit is not essentially different from the "reputational damages" visited by the defamation of a false acquisition. Particularly, the Seventh Circuit.

Before *Albright v. Oliver* reached this Court, it was before the Seventh Circuit which remarked upon the similarities of the damages inflicted by defamation and a malicious prosecution:

> The medley of harms that a malicious prosecution inflicts when, as in this case, the defendant is exonerated before any punishment that is imposed – indeed before he is even put on trial – is similar to that inflicted by defamation, which by impairing a person's reputation not only embarrasses and even outrages him but also undermines his ability to make favorable transactions, whether business or personal, thereby subjecting him to costs pecuniary and nonpecuniary or both. It also puts him to the expense of bringing a suit for defamation to recover his good name. If the injuries that defamation imposes do not constitute a deprivation of liberty or property within the meaning of the due process clause, then neither do the injuries that malicious prosecution imposes.

Albright v. Oliver, 975 F.3d 343, 345-46 (7th Cir. 1992)

Subsequent to this Court's affirmance of *Albright*, the Seventh Circuit was faced with another § 1983 claim where there had been "no arrest or other seizure of the

defendant." *Smith v. Bd. of Trustees of University of Illinois*, 34 F.3d 432, 434 (7th Cir. 1994). Gleaning from *Albright* that the only constitutional remedy was under the Fourth Amendment (via the Fourteenth) the court reasons:

> If liberty is not at stake, it is difficult to see how either tort [malicious prosecution or the use of process] could be thought to invade an interest protected by the due process clause (life, liberty, property) merely by virtue of its effect upon the reputation, or, like any suit, the pocketbook of the defendant. Defamation is not actionable in such circumstances, because reputation is not property within the meaning of the due process clause. . . . How torts so closely related to defamation in the interest that they invade as a malicious prosecution and abuse of process could be thought to deprive a defendant of property mystifies us.
>
> *Id.*

In a later Seventh Circuit case, *Spiegel v. Rabionovitz*, 121 F.3d 251 (7th Cir. 1997), the plaintiff claimed § 1983 damages due to his eviction, his adverse employment status and loss of income. The district court found that Spiegel's eviction was a probable consequence of his malicious prosecution. The Seventh Circuit disagreed and reversed:

> Although Spiegel's circumstances were unfortunate, the rationale of *Smart* instructs that none of them are deprivations of property of a constitutional magnitude.

Id. at 256 Finlan's nearly identical damages are likewise not deprivations.

The Fifth Circuit's opinion in *Colson v. Grohman*, 174 F.3d 498 (5th Cir. 1999) is likewise fatal to Finlan's § 1983 claims. Finlan's claims here are

> . . . inconsistent with our recent case law unequivocally holding that retaliatory criticisms, investigations, and false acquisitions that do not lead to more tangible adverse action are not actionable under § 1983.

Id. at 513. The "recent case law" and sole authority cited in support of that statement in the accompanying footnote 8 is *Johnson v. LDOA*, which is said to be "consistent with our general rule that the plaintiff must cross a certain threshold of harm before she can bring a claim for First Amendment retaliation." *Id.* The opinion concludes that Colson "has not alleged any First Amendment *deprivation* actionable under § 1983." (*Id.* at 514 – emphasis supplied) Citing *Paul v. Davis*, the opinion further concludes that there was no infringement as to "her Fourteenth Amendment due process claim" – described as resting "on a theory that she suffered harm to her reputation coupled with the denial of her constitutional rights to be without retaliation." *Id.* Finlan is in no better or different position from that of Colson. He is not entitled to a recovery under § 1983.

VIII. ANOTHER SUPPORTING AUTHORITY: THE *PARRATT/HUDSON* DOCTRINE

Rule 13 of the Texas Rules of Civil Procedure[6] is the state law analogue of Rule 11 of the Federal Rules of Civil

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[6] Rule 13 provides, in relevant part:

> The signatures of attorneys or parties constitute a certificate by them that they have read the pleading,

Procedure. Through it, Texas has provided a process through which Finlan could seek to have the injury occasioned to him by the DISD's filing of the lawsuit in question redressed.

Finlan's characterization of the September 19, 1995 filing as being in retaliation for his exercise of First Amendment rights fits snugly within Rule 13's prescribed filings that are (a) "groundless" and (b) either i) "brought in bad faith" or ii) "brought for the purpose of harassment." The monetary sanctions imposed can be as high as necessary to accomplish the rules intendment. *Bradt v. Sebek*, 14 S.W.2d 756 (Tex. App. – Houston [1st Dist.] 2000 – PDE), *cert. den.*, ___ U.S. ___, 149 L.Ed.2d 138 (2001). Another court of appeals has found "particularly applicable" in deciding Rule 13 motions the following:

1) the nature and extent of prejudice, apart from out-of-pocket expenses, suffered by

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motion, or other paper; that to the best of their knowledge, information, and belief formed after reasonable inquiry the instrument is not groundless and brought in bad faith or groundless and brought for the purpose of harassment. Attorneys or parties who shall bring a fictitious suit as an experiment to get an opinion of the court, or who shall file any fictitious pleading in a cause for such a purpose, or shall make statements in pleading which they know to be groundless and false, for the purpose of securing a delay of the trial of the cause, shall be held guilty of a contempt. If a pleading, motion or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, after notice and hearing, shall impose an appropriate sanction available under Rule 215-2b, upon the person who signed it, a represented party, or both.

> the offended person as a result of the misconduct;
>
> 2) the impact of the sanction on the offender, including the offender's ability to pay a monetary sanction;
>
> 3) the impact of the sanction on the offended party, including the offended person's need for compensation;
>
> 4) the relative magnitude of sanction necessary to achieve the goal or goals of the sanction; [and]
>
> 5) burdens of the court system attributable to the misconduct, including consumption of judicial time and incurrence of . . . other court costs.

Hawkins v. Estate of Volkmann 898 S.W.2d 334, 339 (Tex. App. – San Antonio 1995 – writ den). Rule 13 clearly meets the *Parratt/Hudson* requirement of a state-provided adequate post-deprivation remedy.

The other *Parratt/Hudson* requirement is that the deprivation be random and unauthorized. The best criteria we know of for determining what conduct is random and unauthorized was laid down by the late Judge John Minor Wisdom in *Charbonnet v. Lee,* 951 F.2d 638, 644 (5th Cir. 1992): "[B]ecause the State has instituted a policy forbidding such conduct." Rule 13 is such a policy.

The *Parratt/Hudson* doctrine provides yet one more reason why Finlan's writ should be denied.

IX. CONCLUSION

Over the many years and the many lawsuits, Finlan has floated more than a few constitutional theories of recovery, mostly Due Process but, every now and then, Equal Protection as well.

Here, Finlan seeks Unequal Protection. In essence he is saying that, since he has been so free and so frequent in his speech, he is not to be treated like his listeners, his fellow citizens. Nor can he be made to answer in a state court of law as to whether or not he is involved in a scheme to bilk hundred of thousands of dollars from a state entity without that entity's incurring § 1983 liability. Finlan is wrong: Section 1983 was meant to provide a remedy for the wronged, not a sanctuary for the wrongdoer.

The DISD Respondents respectfully request that this Court note its lack of jurisdiction and dismiss Finlan's Petition.

Respectfully submitted,

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No. 92-12023-E

DON VENABLE and RICHARD E. FINLAN, et al.,	§	IN THE DISTRICT
	§	COURT OF
	§	DALLAS COUNTY,
Plaintiffs,	§	TEXAS
v.	§	101ST JUDICIAL
	§	DISTRICT
DALLAS INDEPENDENT SCHOOL DISTRICT,	§	
	§	
Defendant.	§	

ORDER GRANTING DISD'S MOTION TO TRANSFER

Came on to [sic] heard DISD's Motion to Transfer filed on January 29, 1999 and seeking the transfer into this Court for consolidation with the above-referenced cause the case of *Don Venable et al. v. Sandy Kress, et al.*, Cause No. 94-09418-I, in the 162nd Judicial District Court, Dallas County, Texas. Such transfer was sought pursuant to Rule 1.1(f)(2) of the Dallas Civil District Court Rules. Having considered the Motion and the Opposition, the Court is of the opinion that such Motion should be granted. It is therefore ORDERED that Cause No. 94-09418-I, presently pending in the 162nd District Court, Dallas County, Texas be transferred into this Court and consolidated with Cause No. 92-12023-E.

SIGNED this 19th of March 1999.

/s/ Jay Patterson, Jr.
JUDGE PRESIDING

NO. 92-12023-E

DON VENABLE and RICHARD E. FINLAN, et al.,	§	**IN THE DISTRICT COURT OF DALLAS COUNTY, TEXAS**
Plaintiffs,	§	
v.	§	**101st JUDICIAL DISTRICT**
DALLAS INDEPENDENT SCHOOL DISTRICT, SANDY KRESS, SCHWARTZ & EICHELBAUM, P.C., LEONARD J. SCHWARTZ, DENNIS J. EICHELBAUM, MARVIN EDWARDS, RENE CASTILLA, TRINI GARZA, DAN PEAVY, HOLLIS BRASHEAR, KATHLYN GILLIAM, and YVONNE EWELL	§	
Defendants.	§	

ORDER

Before this Court are various Motions for Summary Judgment filed by Plaintiffs Don Venable, Richard Finlan, and David Venable, Defendant Dallas Independent School District ("DISD"), and Defendants Sandy Kress, Marvin Edwards, Rene Castilla, Trini Garza, Hollis Brashear, Kathlyn Gilliam, and Yvonne Ewell (the "DISD Defendants"). The Motions are as follows:

1. Motion for Summary Judgment (filed by Plaintiff Finlan on or about December 23,

1998 and joined by Plaintiffs Don Venable and David Venable on or about January 6, 1999)

2. Motion for Partial Summary Judgment (filed by Plaintiff Don Venable on or about January 28, 1999 and joined by Plaintiff Richard Finlan on or about February 22, 1999 and Plaintiff David Venable on or about February 25, 1999)

3. Amended Motion for Partial Summary Judgment (filed by Plaintiff Don Venable on or about February 22, 1999)

4. Motion for Partial Summary Judgment (filed by Plaintiff Don Venable on or about March 30, 1999)

5. Second Motion for Partial Summary Judgment against Sandy Kress, Schwartz & Eichelbaum, P.C., Leonard Schwartz, Dennis J. Eichelbaum, Marvin Edwards, Rene Castilla, Trini Garza, Hollis Brashear, Kathlyn Gilliam, and Yvonne Ewell (filed by Plaintiff Finlan on or about March 30, 1999)

6. Motion for Summary Judgment on Qualified and Official Immunity Grounds (filed by the DISD Defendants on or about April 13, 1999)

7. Motion for Summary Judgment Based on Absolute Legislative Immunity (filed by the DISD Defendants, except Defendant Marvin Edwards, on or about April 14, 1999)

8. No-Evidence Motion for Summary Judgment Against Sandy Kress, Marvin Edwards, Rene Castilla, Trini Garza, Hollis

Brashear, Kathlyn Gilliam, and Yvonne Ewell's Affirmative Defense of Immunity (filed by Plaintiff Finlan on or about May 20, 1999)

9. Motion for Partial Summary Judgment Against Sandy Kress, Marvin Edwards, Rene Castilla, Trini Garza, Hollis Brashear, Kathlyn Gilliam, Yvonne Ewell and Dallas Independent School District (filed by Plaintiff Finlan on or about May 20, 1999)

10. Motion for Summary Judgment (filed by DISD and the DISD Defendants on or about May 21, 1999)

11. Motion for Partial Summary Judgment Against Non-Lawyer Defendants (filed by Plaintiff David Venable on or about May 21, 1999)

12. Motion for Partial Summary Judgment and Brief in Support (filed by Plaintiff Don Venable on or about May 21, 1999)

On June 17, 1999, this Court heard argument from counsel and parties (if not represented by counsel) and is of the opinion that DISD and the DISD Defendants' Motions should be granted and that Plaintiffs' Motions should be denied. Accordingly,

It is ORDERED, ADJUDGED, and DECREED that the Motion for Summary Judgment of the DISD and DISD Defendants (#10) is GRANTED.

It is further ORDERED, ADJUDGED, and DECREED that the DISD Defendants' Motion for Summary Judgment on qualified and Official Immunity Grounds (#6) is GRANTED.

It is further ORDERED, ADJUDGED, and DECREED that Motion for Summary Judgment Based on Absolute Legislative Immunity of the DISD Defendants (except Marvin Edwards) (#7) is DENIED as MOOT.

It is further ORDERED, ADJUDGED, and DECREED that Plaintiffs' Motions for Summary Judgment as they relate to DISD or the DISD Defendants (#s 1-5, 8-9, 11-12) are DENIED.

It is further ORDERED, ADJUDGED, and DECREED that all objections to summary judgment evidence are OVERRULED.

Any further relief sought by Plaintiffs against the DISD or the DISD Defendants not expressly granted herein is denied.

SIGNED this 26th day of July 1999.

/s/ Jay Patterson, Jr.
JUDGE PRESIDING

CAUSE NO. 92-12023-E

DON VENABLE and RICHARD E. FINLAN, et al.,	§	IN THE DISTRICT COURT OF
Plaintiffs,	§	DALLAS COUNTY, TEXAS
v	§	
DALLAS INDEPENDENT SCHOOL DISTRICT, et al.,	§	101ST JUDICIAL DISTRICT
Defendants.	§	

~~ORDER~~ [FINAL JUDGMENT]

On October 7, 1999, came on to be heard various motions for summary judgment filed by Plaintiffs Don Venable, Richard Finlan, and David Venable ("Plaintiffs"), Cross-Plaintiff Ed Grant ("Cross-Plaintiff"), and Defendants Dennis J. Eichelbaum, Leonard J. Schwartz, and Schwartz & Eichelbaum, P.C. ("S&E Defendants"). The motions heard are as follows:

A. Motions filed by Plaintiffs Don Venable, Richard Finlan, and David Venable and Cross-Plaintiff Ed Grant ("Plaintiffs' and Cross-Plaintiff's Motions").

   1. Motion for Partial Summary Judgment (filed by Plaintiff Don Venable on or about March 30, 1999).

   2. Second Motion for Partial Summary Judgment Against Sandy Kress, Schwartz & Eichelbaum, P.C., Leonard Schwartz, Dennis J. Eichelbaum, Marvin Edwards, René Castilla, Trini Garza, Hollis Brashear, Kathlyn Gilliam, and Yvonne Ewell (filed by Plaintiff Richard Finlan on or about March 30, 1999).

3. Motion for Partial Summary Judgment and Brief in Support (filed by Plaintiff Don Venable on or about May 21, 1999).

4. Motion for Partial Summary Judgment Against Dennis Eichelbaum, Leonard Schwartz, and Schwartz & Eichelbaum, P.C. (filed by Plaintiff Richard Finlan on or about June 24, 1999).

5. Motion for Partial Summary Judgment Against Cross-Defendants (filed by Cross-Plaintiff Ed Grant on or about June 25, 1999).

B. Motions filed by Defendants Dennis J. Eichelbaum, Leonard J. Schwartz, and Schwartz & Eichelbaum, P.C. ("S&E Defendants' Motions").

1. Motion for Summary Judgment (filed by S&E Defendants on or about June 25, 1999)

2. Amended Motion for Summary Judgment Based on Immunity Grounds (filed by S&E Defendants on or about June 25, 1999).

3. Motion for Summary Judgment Regarding Ed Grant's Cross Action for Indemnity (filed by S&E Defendants on or about June 25, 1999).

4. Supplemental Motion for Summary Judgment (filed by S&E Defendants on or about August 23, 1999).

The Court, at a previous hearing on September 14, 1999, granted the S&E Defendants' Motion for Leave to File Supplemental Motion for Summary Judgment (filed August 23, 1999).

On November 17, 1999, came on to be heard the following motions filed by the S&E Defendants:

1. Second Supplemental Motion for Summary Judgment (filed by S&E Defendants on or about October 15, 1999).

2. Supplemental Motion for Summary Judgment (re-filed by S&E Defendants on or about October 22, 1999)[1].

The Court granted the S&E Defendants' Motion for Leave to File Second Supplemental Motion for Summary Judgment at the October 7, 1999 hearing. The Court has further considered the parties' objections to the summary judgment evidence and has invited the parties to submit a separate order setting forth the Court's rulings thereon.

After hearing argument from counsel and parties (if not represented by counsel) on October 7, 1999 and November 17, 1999; after examining the pleadings timely filed; after considering the Plaintiffs' and Cross-Plaintiff's Motions, the S&E Defendants' Motions, and the parties' responses and replies thereto; and after considering the evidence and record properly before it, the Court concluded, and so ordered, that: (1) the S&E Defendants' Motion for Summary Judgment (filed 6/25/99) be GRANTED; (2) [cross plaintiff Ed Grant's Motion for Coutirenence was DENIED and] the S&E Defendants' Motion for Summary Judgment Regarding Ed Grant's Cross-Action for Indemnity (filed 6/25/99) be GRANTED; (3) the S&E Defendants' Amended Motion

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[1] THE S&E Defendants resubmitted and reset for hearing this Motion originally heard October 7, 1999, in response to objections by Plaintiffs regarding notice. Assuming arguendo that Plaintiff's objections were otherwise valid (which Defendants deny), this resubmission cured Plaintiffs' objections.

for Summary Judgment on Immunity Grounds (filed 6/25/99) be DENIED; and (4) the S&E Defendants' Supplemental Motion for Summary Judgment (filed 8/23/99 and re-filed 10/2299) be GRANTED, except as to immunity grounds, which are hereby DENIED; and (5) the S&E Defendants' Second Supplemental Motion for Summary Judgment (filed 10/15/99) be GRANTED, except as to immunity grounds, which are hereby DENIED; and (6) the Plaintiffs' and Cross-Plaintiff's Motions be DENIED. Accordingly,

IT IS ORDERED, ADJUDGED and DECREED that Plaintiff David Venable take nothing against Defendants Dennis J. Eichelbaum, Leonard J. Schwartz, and Schwartz & Eichelbaum, P.C.

IT IS ORDERED, ADJUDGED and DECREED that Plaintiff Richard Finlan take nothing against Defendants Dennis J. Eichelbaum, Leonard J. Schwartz, and Schwartz & Eichelbaum, P.C.

IT IS ORDERED, ADJUDGED and DECREED that Plaintiff Don Venable take nothing against Defendants Dennis J. Eichelbaum, Leonard J. Schwartz, and Schwartz & Eichelbaum, P.C.

IT IS ORDERED, ADJUDGED and DECREED that Cross-Plaintiff Ed Grant take nothing against Defendants Dennis J. Eichelbaum, Leonard J. Schwartz, and Schwartz & Eichelbaum, P.C.

This judgment is intended to be a final and appealable judgment, disposing of all claims and parties to this cause. IT IS THEREFORE ORDERED, ADJUDGED and DECREED that all relief not expressly granted in this

judgment, [in favor of the S&E Defendants or in] ~~and~~ any other judgment or order which has granted the DISD Defendants summary judgment relief that Plaintiff(s) take nothing, is hereby denied[, unless express granted or denied by previous written order. Costs shall be assessed against the party incurring same.]

SIGNED this 19th day of June, 2000.

/s/ Jay Patterson, Jr.
JUDGE PRESIDING

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

DON VENABLE Plaintiff, v. HOLLIS BRASHEAR, et al., Defendants.	§ § § § § § §	CIVIL ACTION NO. 3:97-CV-2187-P

ORDER

(Filed Jan. 24, 2000)

This is a civil rights suit filed by plaintiff, Don Venable ("Venable") or "plaintiff") against the Dallas Independent School District ("DISD"), several DISD trustees, and attorneys of the DISD. Venable alleges claims pursuant to 42 U.S.C. § 1983 for violations of his First Amendment right of free access to the courts and state law claims of malicious prosecution and civil conspiracy. The court granted summary judgment in favor of all of the defendants by order filed on September 30, 1999. A final judgment denying Venable any relief from his claims was also filed on September 30, 1999. Presently before the court are Venable's motion for reconsideration filed October 29, 1999 and Amended Motion for Reconsideration filed November 15, 1999; the DISD defendants' response filed November 12, 1999; Venable's reply filed on November 29, 1999; the Friedman Defendants' response filed December 6, 1999; and Venable's consolidated reply filed December 16, 1999.

In the order of September 30, 1999 the court determined that to succeed on his First Amendment claim, Venable had to allege the deprivation of a constitutional right and establish all of the elements of the common law tort of malicious prosecution. In reaching this conclusion, the court relied on *Johnson v. Louisiana Dept. Of Agriculture*, 18 F.3d 318 (5th Cir. 1994) and *Colson v. Grohman*, 174 F.3d 498 (5th Cir. 1999). Venable takes issue with the court's reliance on *Johnson*, a First Amendment malicious prosecution retaliation case. Venable asserts that he is not alleging a First Amendment malicious prosecution case. Instead, Venable explains that he alleges a First Amendment retaliation case and a common law malicious prosecution claim. Venable then argues that he should not have to establish the elements of the state law tort of malicious prosecution in order to prevail on his First Amendment retaliation claim. In support of his argument, Venable points to other First Amendment retaliation cases where courts did not require the plaintiffs to establish the elements of an underlying tort in addition to the alleged constitutional violation. The court does not disagree with Venable's characterization of his claims. Nonetheless, Venable' First Amendment claim is that the defendants retaliated against his exercise of First Amendment rights by filing civil lawsuits against him. In *Johnson*, the plaintiff complained that he was cited for violations by a state regulatory agency in retaliation for plaintiff's exercise of First Amendment rights. The Fifth Circuit characterized the claim as "one for malicious prosecution in violation of Johnson's First Amendment rights." *Johnson v. Louisiana Dept. Of Agriculture*, 18 F.3d at 320. Venable attempts to

distinguish *Johnson* on the bases that the First Amendment right involved in his case is different than in *Johnson* and because the alleged retaliation involved the filing of civil lawsuits rather than the giving of citations. The court is not presuaded by this argument. The allegations in both *Johnson* and this case are that a governmental entity retaliated against a citizen by use of some type of legal process because of the citizen's exercise of First Amendment rights. Hence, the court finds that Venable's claims are properly characterized as First Amendment malicious prosecution retaliation claims as they were in *Johnson*. Venable relies on *Enlow v. Tishomingo County, Mis.*, 962 F.2d 501 (5th Cir. 1992) (*Enlow* I) and 45 F.3d 885 (5th Cir. 1995) (*Enlow* II), in support of his argument that there is no requirement that he must establish the elements of the malicious prosecution tort. *Enlow* involved an allegation by the plaintiffs that they had been indicted in retaliation for exercising their First Amendment rights. However, the decision in *Enlow* turned on the finding that no retaliatory intent existed. The issue of proving the elements of the underlying malicious prosecution tort was not raised in that case and was not before the court. In the absence of more clear authority, the court remains convinced that *Johnson* provides the proper framework for analysis in this case. The *Johnson* court noted that if the First Amendment protects against malicious prosecution, a plaintiff must not only allege a deprivation of a constitutional right, but must also establish all of the elements of the underlying tort claim. *Johnson v. Louisiana Dept. of Agriculture*, 18 F. 3d at 320. Since Venable has failed to establish his malicious prosecution claim, his First Amendment claim also fails.

Alternatively, if Venable is correct that he does not need to establish the elements of an underlying tort to prove his First Amendment retaliation claim, Venable's First Amendment claim still fails. The Fifth Circuit has consistently held that not all actions which may infringe on a citizen's First Amendment rights are actionable. In *Colson v. Grohman*, 174 F.3d 498 (5th Cir. 1999), the court noted that "although some actions . . . may have the effect of chilling protected speech, they are not actionable." *Id.* at 511. The *Colson* court further noted that *Johnson v. Louisiana Dept. Of Agriculture* was consistent with the Circuit's general rule that a "plaintiff must cross a certain threshold of harm before [h]e can bring a claim for First Amendment retaliation." *Id.* at 513, fn. 8. In this case, Venable identifies two specific acts of the school district which he maintains were taken in retaliation for Venable's exercise of his First Amendment rights. The first act was the filing of a declaratory judgment action in state court after Venable made a request for documents under the Texas Open Records Act. This suit was promptly dismissed after counsel for Venable informed the school district that Venable was not a proper party to the suit due to a recent change in the law. The second act was DISD's filing of a counterclaim for wrongful injunction after Venable filed suit and obtained a temporary restraining order against DISD. On the same day that Venable obtained the temporary restraining order, the school district obtained a stay of the restraining order from a court of appeals. Venable ultimately dismissed his injunction suit against the district, and DISD's counterclaim was also later dismissed by the court. Venable alleges that DISD and its attorneys embarked on an all

out legal assault against Venable in retaliation for Venable's exercise of his First Amendment rights and points to a resolution adopted by the school board on June 22, 1995. However, as the magistrate judge noted in his Findings and Recommendation, the only litigation initiated by the district against Venable after the resolution was adopted were the declaratory judgment action and the counterclaim for wrongful injunction. One suit was in response to a request by Venable for documents pursuant to the Texas Open Records Act, and the other was in response to a temporary restraining order obtained by Venable which was stayed by the court of appeals on the same day the order was issued. On the facts contained in the summary judgment record, the court finds that Venable has not "crossed that certain threshold of harm" such that he can bring a First Amendment retaliation claim predicated on the above described actions of the school district. While the school district should not be allowed to use the court system to retaliate against a citizen's exercise of First Amendment rights, the district cannot be hamstrung to the point of being unable to defend itself against perceived frivolous litigation.[1] The court has reviewed the remaining arguments in Venable's motion for reconsideration and finds them to be without merit. Accordingly, plaintiff's motions for reconsideration of the court's order of September 30, 1999 are Denied.

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[1] The court notes that Venable had available the remedy of seeking sanctions against the school district in the state court where the suits were filed if the district's suits were found to be frivolous.

Signed this 24th day of January 2000.

/s/ Jorge A. Solis
Jorge A. Solis
United States District Judge

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 00-10198
Summary Calendar

DON VENABLE,

Plaintiff-Appellant,

versus

KATHLEEN LOES; ET AL.,

Defendants,

CHAD WOLLERY; LARRY FRIEDMAN;
FRIEDMAN & ASSOCIATED; ALAN B. RICH;
DAVID REESE; SCHWARTZ & EICHELBAUM PC;
DENNIS J. EICHELBAUM,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Texas
USDC No. 3:97-CV-2187

(Filed Sep. 27, 2000)

Before DAVIS, JONES and DEMOSS, Circuit Judges.

PER CURIAM:*

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*Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

Don Venable, a self-professed watchdog over the Dallas Independent School District (DISD), appeals the district court's grant of summary judgment for the defendants in his 42 U.S.C. § 1983 action against Chad Woolery, General Superintendent of the Dallas Independent School District, and the attorneys representing Woolery.

Venable contends that the trial court erred in requiring him to prove the elements of the allegedly analogous tort of malicious prosecution as part of his First Amendment retaliation claim. He also argues that the district court erred by requiring him to demonstrate an elevated degree of injury.

In his single allegation of harm, that his access to his $1,000 bond was delayed, Venable has not crossed the threshold of actionable harm required under § 1983 on his claim for First Amendment retaliation. *Colson v. Grohman*, 174 F.3d 498 (5th Cir. 1999); *Pierce v. Texas Dep't of Criminal Justice, Inst. Div.*, 37 F.3d 1146, 1150 (5th Cir. 1994). The district court did not err.

We further find that Venable's appeal is without arguable merit and is frivolous. *See Howard v. King*, 707 F.2d 215, 219-20 (5th Cir. 1983). Because the appeal is frivolous, it is DISMISSED. *See* 5TH CIR. R. 42.2. Venable's petition for en banc consideration and his motion to expedite such consideration are DENIED.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 00-11111
Summary Calendar

DON VENABLE; ET AL

Plaintiffs

RICHARD E FINLAN

Plaintiff - Appellant

v.

WILLIAM KEEVER, ET AL

Defendants

WILLIAM KEEVER; DENNIS J EICHELBAUM; LAWRENCE J. FRIEDMAN; ALAN B RICH

Defendants - Appellees

Appeal from the United States District Court
for the Northern District of Texas
USDC No. 3:96-CV-580-L

(Filed Jun. 12, 2001)

Before KING, Chief Judge and WIENER and DENNIS, Circuit Judges. PER CURIAM:*

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*Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

Richard E. Finlan appeals the district court's grant of summary judgment for the defendants in his 42 U.S.C. § 1983 action. The district court held that Finlan's allegations that the defendants filed a retaliatory counterclaim in violation of his First Amendment rights to access to the courts and to petition the government did not allege the violation of a clearly established constitutional right.

Finlan argues that he has a constitutional right to file lawsuits free from retaliation by government officials. He contends that it is a clearly established right that the Government cannot take retaliatory action against an individual designed to punish or chill the exercise of First Amendment rights to free speech or to petition the Government. He contends that Keever's declaratory judgment counterclaim was intended to punish him for his First Amendment activities.

Finlan cites *Hale v. Townley*, 45 F.3d 914, 920 (5th Cir. 1995) and *Crowder v. Sinyard*, 884 F.2d 804, 813 (5th Cir. 1989) in support of his argument that the right to be free from retaliation for exercising the right of access to the courts was clearly established. However, the right the official is alleged to have violated must have been clearly established in a particularized and relevant sense, meaning that the "contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Hale*, 45 F.3d at 920 (internal quotations and citation omitted). The issue in this case is whether the contours of the right to be free from retaliation for exercising the First Amendment rights in question include the right to be free from a counterclaim.

We rejected an almost identical claim of an alleged retaliatory counterclaim filed by the defendant in a Title VII lawsuit in *Scrivener v. Socorro Indep. School Dist.*, 169 F.3d 969, 972 (5th Cir. 1999). We stated that "[i]t is not obvious that counterclaims or lawsuits filed against a Title VII plaintiff ought to be cognizable as retaliatory conduct under Title VII. After all, companies and citizens have a constitutional right to file lawsuits, tempered by the requirement that the suits have an arguable basis." *Id.* There is no clearly established right to be free from a counterclaim filed by a government official. The district court addressed Finlan's retaliation claim adequately and properly granted summary judgment for the defendants.

Finlan argues that the district court erred in assessing costs against him because his suit was not frivolous. The decision of the district court to award costs is reviewed for abuse of discretion. *Cypress-Fairbanks Indep. School Dist. v. Michael F.*, 118 F.3d 245, 256 (5th Cir. 1997). Fed. R. Civ. P. 54(d) (1) provides that "costs other than attorneys' fees shall be allowed as of course to the prevailing party unless the court otherwise directs." Rule 54(d) creates a strong presumption that the prevailing party will be awarded costs. *Schwarz v. Folloder*, 767 F.2d 125, 131 (5th Cir. 1985).

The defendants prevailed, and Finlan offers no argument as to why the district court should not have awarded costs under the standards of Rule 54(d). His argument that the defendants should not have been awarded costs unless his lawsuit was determined to be frivolous is not the correct standard for assessing costs.

We further find that Finlan's appeal is without arguable merit and is frivolous. *See Howard v. King*, 707 F.2d 215, 219-20 (5th Cir. 1983). Because the appeal is frivolous, it is DISMISSED. *See* 5TH CIR. R. 42.2. Appellee William Keever's motion to accept his appendix as filed is GRANTED.

APPEAL DISMISSED AS FRIVOLOUS; MOTION GRANTED.